93-979

NO._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1993

CHRIS LUCERO,
Petitioner,

vs.

STATE OF NEW MEXICO
Respondent.

Petition For A Writ Of Certiorari To The New Mexico Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHETHER PETITIONER'S CONVICTION AND SENTENCE VIOLATE HIS CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES BECAUSE THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT DID NOT SUPPLY SUFFICIENT FACTS FROM WHICH THE MAGISTRATE COURT COULD FIND PROBABLE CAUSE AND THE INFORMATION CONTAINED IN THE AFFIDAVIT WAS STALE.

DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I , Ramon I. Garcia, declare under penalty of perjury that I am a member of the bar of this Court and counsel for petitioner, Chris Lucero, and that I personally mailed the Petition for Writ of Certiorari to this Court by depositing the original and nine copies in an envelope addressed to the Clerk of this Court, sealed the envelope, and deposited it in the United States mailbox at the U.S. Post Office on North Pennsylvania, Roswell, New Mexico at approximately 2:00 P.M., on the 1st day of December, 1993.

Respectfully Submitted,

Ramon D Garcia

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

CHRIS LUCERO,
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STATE OF NEW MEXICO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO SUPREME COURT

Petitioner, Chris Lucero, respectfully requests that a Writ of Certiorari be issued to review the judgment of New Mexico Supreme Court.

OPINION BELOW

The order denying petition for Writ of Certiorari to the New Mexico Court of Appeals is attached as Appendix A. The decision of the New Mexico Court of Appeals

is attached as Appendix B. The New Mexico District Court's Order denying motion to suppress and the district court's Judgment, Sentence and Commitment is attached as Appendix C.

JURISDICTION

The Order denying Writ of Certiorari to the New Mexico Court of Appeals was filed September 22, 1993. The jurisdiction of the court is involved under 28 U.S.C. 1257(A). Pursuant to Supreme Court Rule 13.1 and 28 U.S.C. 2101(c), this petition is timely filed by December 4, 1993.

CONSTITUTIONAL PROVISION

The provision of the United States Constitution involved in this case is the following:

> THE FOURTH AMENDMENT WHICH PROVIDES AS FOLLOWS:
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no

> warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized.

STATEMENT OF CASE

Chris Lucero (hereinafter Lucero) was convicted in state district court of possessing marijuana with intent to distribute over eight ounces and of being a habitual offender on November 9, 1992. An Order Denying Motion to Suppress was filed on June 19, 1992. Lucero sought to suppress thirteen (13) ounces of marijuana which were found in his home on March 13, 1992 after a search was conducted based on search warrant issued by the Chaves County Magistrate Court on the same day.

The search warrant was issued by the magistrate court on March 13, 1992 on Lucero's residence located at 510 South Cypress, Roswell, New Mexico. The search warrant was issued on the application of

officer Louis Mallion of the Roswell Police Department. The affidavit for the search warrant was attached to the search warrant as exhibit "A" and is fully set out below.

1. Affiant is Lou Mallion a full-time salaried Roswell Police Officer with thirteen years of law enforcement experience.
2. Affiant learned from Confidential Informant who has provided reliable information in the past six months on at least two occasions that has proven to be true. The Informant has made controlled purchases on illegal drugs in the past six (6) months. The Informant has observed a small amount of marijuana at 510 South Cypress Roswell, Chaves County, New Mexico within the past seventy-two hours.
3. The Informant knows what marijuana is from the past. The Informant has been involved in the sale of illegal drugs for at least six years. The informant has packaged and has sold marijuana in the past.
4. Affiant learned from New Mexico Probation and Parole that Chris Lucero completed his parole in January 1992 for possession of marijuana.

5. Affiant learned from Fred Hill of the Roswell Police Department that Chris Lucero is known to him as a drug dealer, who Officer Hill has arrested in the past for possession of illegal drugs.
6. Affiant learned from Roswell Police reports that Chris Lucero lives at 510 South Cypress, Roswell, Chaves County, New Mexico.

On May 20, 1992, the Roswell Public Defender, who was representing Lucero at that time, filed its motion to suppress evidence. The grounds raised in the motion to suppress evidence was the insufficiency of the affidavit to provide probable cause for the issuance of the warrant. Counsel argued that the affidavit did not provide sufficient information to show probable cause because it did not meet the two prong test of Aguilar v. Texas, 378 U.S. 108, 845 S.Ct. 1509, 12 LEd 2d 723 (1964). Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 LEd 2d 637 (1969). On June 15, 1992, the district court denied Lucero's

motion to suppress finding that the elapsed time of 72 hours did not make the information stale and there was sufficient information in the affidavit regarding the reliability of the informant.

On September 10, 1992, the jury found Lucero guilty of possession of marijuana with intent to distribute. On November 9, 1992, the district court filed a judgment, sentence, and commitment on the charge of possession with intent to distribute and on the charge of being a habitual offender. Lucero appealed his conviction to the New Mexico Court Appeals and it was affirmed by memorandum opinion on August 11, 1993, based on the issues raised in Lucero's motion to suppress.

The New Mexico Supreme Court denied Lucero's petition for certiorari on September 22, 1993.

ARGUMENT FOR ALLOWANCE OF THE WRIT

PETITIONER'S CONVICTION VIOLATES THE FOURTH AMENDMENT'S REQUIRMENT THAT WARRANTS NOT ISSUE BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION WHERE THE INFORMATION CONTAINED IN THE AFFIDAVIT FOR SEARCH WARRANT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE SINCE THE INFORMATION DID NOT ESTABLISH THE INFORMANT'S CREDIBILITY OR THAT THE INFORMATION THAT WAS PROVIDED WAS RELIABLE.

Lucero's conviction of possession of marijuana with intent to distribute violates the warrant requirement of the Fourth Amendment which protects persons against unreasonable searches and seizures. In analyzing the information contained in the affidavit, which is set out in full in petitioner's statement of the case, the affidavit does not give a neutral magistrate sufficient information to believe that evidence of a crime existed on the premises at the time the warrant was issued. Further, the affidavit fails to pro"ide substantial evidence that the source of

the information, a confidential informant is credible and reliable.

In analyzing the information contained in the affidavit, we submit to this Court that the affidavit supporting the search warrant does not give a neutral magistrate sufficient information to believe that evidence of a crime existed on the premises at the time the warrant was issued. Further, the affidavit fails to provide substantial evidence that the source of the information, a confidential informant is credible and reliable.

In paragraph two of the affidavit for search warrant, Mallion states that he learned from a confidential informant that the informant had seen a small amount of marijuana at 510 South Cypress, Roswell, Chaves County, New Mexico within the past seventy two (72) hours. Lucero was living at 510 South Cypress, Roswell, New Mexico. The affiant does not provide any information

as to the quantity of the marijuana. There is no information as to who was in possession of the marijuana. The affiant, in the same paragraph, states that the confidential informant has provided reliable information in the past six (6) months on at least two occasions that has proven to be true. We do not know what type of information was provided or whether the information resulted in any arrests or seizures of contraband. In addition, a literal reading of the statement might lead a neutral magistrate to believe that on other occasions, the information given by the informant turned out to be false. The affiant fails to provide reasons why the confidential informant, in this particular case, is credible since there exists no specific details about the alleged observations in Lucero's home. The affiant never states in his affidavit that he conducted any investigation to corroborate the informant's information.

In paragraph three (3) of the affidavit, affiant states that the confidential informant knows what marijuana is because the informant was a drug trafficker for at least six (6) years. In paragraph four (4) of the affidavit, affiant states that Lucero completed his "parole" in January, 1992 for possession of marijuana. Affiant fails to tell the magistrate that Lucero was on "probation" for misdemeanor possession of marijuana. There is no evidence as to when the possession violation occurred or whether it took place in Lucero's residence.

In paragraph five (5) of the affidavit, affiant states that he learned from Fred Hill of the Roswell Police Department that Chris Lucero is known to him as a drug dealer and that Hill has arrested him in the past for possession of illegal drugs. There is no information contained in the affidavit that Hill has arrested Lucero for dealing in drugs or that Hill personally

observed Lucero dealing in drugs. The affiant does not provide any information as to how Hill knows Lucero as a drug dealer. If he knows from other sources that Lucero is a drug dealer, those sources have not been disclosed and how those sources know Lucero is a drug dealer have also not been disclosed in the affidavit. The affiant also fails to state when Hill arrested Lucero for possession and whether the possession occurred at 510 South Cypress.

Once the search warrant was issued, the police executed it and seized thirteen (13) ounces of marijuana from Lucero's residence. Was the search and seizure proper?

The New Mexico Constitution provides that "no warrant... shall issue without a written showing of probable cause supported by oath or affirmation." New Mexico Constitution, Article II, Section 10. To establish probable cause, the applicant for the

warrant must show the existence of facts that would lead a neutral judge or magistrate to reasonably believe that evidence of a crime exists on the premises to be searched. State v. Donaldson, 100 NM 111, 666 P2d 1258 (Ct. App. 1983). The only facts that the issuing magistrate may consider are those contained in the supporting affidavits. State v. Wisdom, 110 NM 772, 800 P2d 206 (Ct. App. 1990). The facts presented in the affidavit herein are insufficient to support a reasonable belief that evidence of a crime existed in Lucero's residence at the time the warrant was issued.

The test for the sufficiency of facts contained in the affidavit in support of a search warrant based on hearsay rather than the affiant's personal knowledge is: 1)Whether the affidavit contains sufficient facts indicating the basis of the informant's knowledge and 2)Whether the affidavit contains sufficient facts indicating the

veracity of the informant. The New Mexico Supreme Court held in State v. Cordova, 109 NM 211, 748 P2d 30 (1989) at P.213:

> Although an affidavit may be based wholly in part on hearsay provided by an unnamed informant, "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the facts were as he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant was 'credible' or his information 'reliable'." See also Aguilar v. Texas, 378 US 108, 845 Ct. 1509, 12 LEd 2nd 723 (1964) and Spinelli v. United States, 393 US 410, 89 S.Ct. 584, 21 LEd 2d 637 (1969)

Rule 5-211 (E) of the New Mexico Rules of Criminal Procedure also sets out the two prong test that must be met to satisfy the probable cause requirements before a search warrant may be issued.

To establish the first prong of the Cordova test, the affidavit must set forth facts indicating that the informant's information of illegal activity was gathered

in a reliable fashion. This prong can be met by establishing the informant's basis of knowledge or through self-verifying detail. Cordova, supra at 218. In this case, the affidavit states that the confidential informant was in Lucero's residence within the past seventy two (72) hours and saw a small amount of marijuana there. There is no indication as to where in the house the marijuana was seen. There is nothing in the affidavit that shows who had possession of the marijuana there. The affidavit fails to identify any of the occupants of the house at the time the marijuana was allegedly seen. The affidavit does not even state that the informant saw Lucero at the residence on that particular day. The alleged marijuana could have been brought to the residence and possessed by anyone. That is, the small amount of marijuana could have been brought to the residence by a guest or even the informant.

Furthermore, there is no information given by the informant that verifies that he was in Lucero's residence such as a general description of the home. Finally, the informant states he saw a small amount of marijuana but does not quantify the amount. The small amount could have been a joint, a baggie, a seedling, or residue. The fact that the confidential informant does not provide any self-verifying detail about his alleged visit to Lucero's residence provides no underlying circumstances from which a magistrate could determine that information was reliable. In addition, there was no attempt by the police to corroborate the informant's information other than to verify that Lucero lived at 510 South Cypress.

To satisfy the second prong of the Cordova test, the affidavit must set forth a substantial basis for believing the informant. This prong can be satisfied if

the affidavit establishes either: 1) That the informant was a truthful person, 2) that the informant had particular motives to be truthful about his specific allegations, or, 3) that the allegations of criminality had been sufficiently corroborated. State v. Therrien, 110 NM 261, 794 P2d 735 at P.263. We submit to this Court that the affidavit in this case does not establish that the informant is a truthful person. The affidavit states that the informant has provided reliable information in the last six (6) months that has proven to be true. There is no indication on the face of the affidavit that the information resulted in any arrest, conviction, or seizures of contraband as a result of the information. Although the information may have been true, one does not know what information was involved and one can reasonably infer that it was not reliable or credible enough to form the basis for an arrest or seizure.

It is apparent that the affiant is attempting to establish the informant's credibility by past performance. However, the assertion in the affidavit that the informant has provided information in the past that was found to be true amounts to no more than the affiant's mere assertion that he knew the informant to be reliable. More is required. In McCray v. Illinois 386 US 300, 87 S.Ct. 1056, 18 LEd 2d 62 (1967) the United States Supreme Court held that a showing by the affiant that the informant had provided information or past occasions which led to arrests and convictions was sufficient to show that the informant was credible. see also lw. LaFave, Search and Seizure Section 3.3 (b) at P.508-509. Although Cordova, supra seems to say that it is not necessary for affidavit to state that informant's past tips resulted in convictions, a reading of State v. Gutierrez 91 NM 542, 577 P2d 440 (Ct. App. 1978) does not support such a holding.

In Gutierrez, supra, the affidavit stated in part: "This informant has given reliable information in the past 18 months which was (sic) resulted in over 20 arrests and 5 felonies (sic) convictions together with the seizure of various controlled substances and contraband." One of the issues presented in Gutierrez is whether the magistrate needed to make an independent determination of whether the informant was reliable. Id. at page 545. This Court held in Gutierrez that there is no requirement that the magistrate make an independent investigation to verify the facts contained in the affidavit if probable cause was established by the affidavit need not list in detail the convictions or arrests.

One need only compare the information contained in the present affidavit with the one set out in Gutierrez. The affidavit in this case contains absolutely no information on its face that would lead a magistrate

to reasonably believe the informant reliable since it contains no information that the past tips have resulted in convictions, arrests or seizures of contraband. The information that the informant had provided information in the past was found to be true amounts to no more than the affiant's mere assertion that he knew the informant to be reliable. Such an assertion is insufficient to meet the Cordova test for establishing the veracity of the informant. State v. Therrien supra at P.263, see also State v. Garcia 90 NM 577, 566 P2d 426. The fact that the informant made controlled purchases of illegal drugs in the last six (6) months or knows what marijuana is, as stated in the affidavit, has no bearing on whether the informant is a person likely to tell the truth.

The affidavit fails to set forth any particular motives that the informant may have in telling the truth in this case.

Rather, one can reasonably infer from the facts set forth in the affidavit, that the informant is a paid informant or a person working off charges to keep himself out of jail and thus has incentive to provide false information. "The expectation of reward for services is an ambiguous variable which very well could furnish reason to be honest and accurate - in the hope of being utilized again - or conversely reason to distort or fabricate, in order to earn at least one payment." Rutledge v. United States, 392 F2d 1062 (D.C. App. 1978). Likewise, there is no particular reason that the specific allegations by the informant were true, due to the fact that the allegations were not against the informant's penal interest. In State v. Perea 85 NM 505, 513 P2d 1287 (Ct. App. 1973), this Court held that a statement against penal interest made by an informant is credible.

Even if the Cordova test is not met, it is not necessarily fatal if the affidavit sets forth facts showing that the informant's statements were corroborated by independent law enforcement investigation. State v. Wisdom, 110 NM 772, 777, 802 P2d 206. In this case, there was no attempt made to corroborate the informant's allegation that marijuana was in Lucero's residence. The information in paragraphs four (4) and (5) reciting Lucero's alleged prior history of drug possession or drug dealing do not corroborate the informant's present information.

If the intent of the affiant was to bolster the reliability of the information given by the informant by alleging that Lucero was known as a drug dealer, there is nothing on the face of the affidavit to show how Fred Hill knew of such information. This information is very questionable because Fred Hill watched Lucero's residence for over six (6) months

specifically to see if Lucero was dealing in drugs or was in possession of drugs. As Fred Hill admitted at Lucero's trial, he was never able to get sufficient evidence to get a search warrant issued. One can infer that Fred Hill did not have enough information to go to the magistrate and recite enough facts to establish probable cause for the issuance of a search warrant.

Failure to establish either an informant's basis of knowledge or veracity either directly or through independent corroboration, renders the search and seizure pursuant to the warrant unlawful and the fruits of such a search are inadmissable. State v. Therrien, supra at P.264.

New Mexico Courts still adhere to the two prong test developed in Aguilar v. Texas, 378 U.S. 108, 845 S.Ct. 1509, 12 LEd 2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 LEd 2d 637 (1969).

Since New Mexico Courts still use the two prong test developed in Aguilar v. Texas, supra and Spinelli v. United States, supra, the affidavit in question in Lucero's case does not meet that standard. The recital in the affidavit that confidential information has provided reliable information in the past six months on at least two occasions that has proven to be true lacks any factual indication of how reliable the informer is. The magistrate judge relied on the arresting officer's facutal determination of the informant's reliablity and not upon his independent judicial determination. This violates the requirement that Aguilar makes for requiring that the affidavit show some of the underlying circumstances from which the officer concludes that the informant was credible or the information reliable.

In the Lucero case, there are no underlying facts to support that informant

is credible or that the informant reliable. There is no showing that the information provided in the past resulted in any arrests, convictions, or discovery of criminal activity. The fact that the informant only provided reliable information on two occasions infers that the informant may have provided false information on other occasions. Because most judicial officers rely on the arresting officer's information, there is no inquiry by the magistrate to corroborate the information or attempt to make an independent judicial determination. Inquiry becomes more important in this case since the warrant was not issued until 72 hours after the police received the information from the informant.

It is important that if the New Mexico Courts are to follow Spinelli and Aguilar, that more than vague statements of reliability be given the police officers. If the courts accept such statements without the underlying

support required by the two prong test, it may result in officers simply making superficial arguments of reliability without proper support and in some cases, stretching the truth to try and have the affidavit pass muster.

Further, by not requiring more than vague statements of reliability, the standard for judging the affidavit may be inadvertently shifted to the totality of the circumstances standards expressed by this court in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 LEd 2d S27 (1983). This court abandoned the "two- pronged test" established in Aguilar and Spinelli and replaced it with the totality of the circumstances analysis. This court held in Gates that the task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of

persons supplying hearsay information, there is a fair probability that contraband or evidence of crime will be found in a particular place. A careful review of the affidavit in Lucero's case shows that there are no underlying facts to support the vague assertion that the informant is reliable because he provided on two occasions information that was true.

There is no indication as to the type of information that was supplied. Whether the information led to arrests or convictions or that the information led to any seizures of contraband. There is no information that the informant was attempting to set up a buy of narcotics. There are other pieces of information which are uncorroborated about the defendant. If you take all the pieces of information, under the totality of the circumstances standard, the affidavit might provide probable cause. In fact, the New Mexico Attorney General urged the New

Mexico Court of Appeals to use a common sense approach to review the affidavit. That is, if the magistrate uses common sense, all of the information would lead him to find that probable cause has been established. However, since New Mexico remains committed to the two-prong test of Aguilar and Spinelli, this affidavit does not meet those standards.

POINT II

THE INFORMATION CONTAINED IN THE AFFIDAVIT WAS STALE WHERE THE INFORMANT HAD SEEN A SMALL AMOUNT OF MARIJUANA AT LUCERO'S RESIDENCE SEVENTY-TWO HOURS BEFORE THE SEARCH WARRANT WAS ISSUED

Moreover, even if this Court finds that the basis of the informant's knowledge and veracity have been sufficiently established, the affidavit is still deficient. The information set forth in the affidavit is stale and does not give rise to probable

cause to believe that evidence of a crime existed on the premises at the time the warrant was issued. The information contained in the affidavit "must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case." Sgro v. United States, 287 US 206, 210 (1932).

Whether the information provided in the affidavit is closely enough related to the time of the issuance of the warrant depends on the nature of the crime alleged. In State v. Garcia, 90NM 577, 578, 566 P2d 426, (Ct. App. 1977), a search warrant was issued one month after some informants saw heroin in defendant's residence. Defendant argued that a one-month delay made the information stale and did not provide probable cause for the issuance of the warrant. In Garcia, supra at P.578, this Court held: "The significance of this time

factor depends on whether there was an isolated transaction or a continuing series of events." Where the crime is of an ongoing nature, the passage of time is less significant than when no such showing is made.

In the affidavit submitted in this case, the allegation of criminal activity demonstrates only an isolated instance of alleged criminal conduct. At the most, the alleged criminal activity is of possession. The affiant's statement in paragraph three (3) that Lucero was previously on parole for possession of marijuana is not indicative of current, marijuana possession. The information in paragraph four (4) states that Detective Hill knows Lucero to be a drug dealer and has arrested Lucero in the past for drug possession. The information that Lucero is known to Hill to be a drug dealer as presented in the affidavit is unreliable and must be struck pursuant to State v. Cordova supra at P.211.

We submit to this court that the decision made by the New Mexico Courts in this case does not square with the Sgro decision. One of the factors most frequently relied upon by appellate courts is the character of the criminal activity under investigation. In Lucero's case, the informant reported only one isolated transaction of marijuana possession. The informant reported no sales or other activity involving drugs at Lucero's residence. The New Mexico Courts held that Lucero was involved in continuing criminal activity based on his status rather than his activities. That is, without any supporting evidence, the New Mexico Courts held that an allegation of being a drug dealer and being on probation for possession of marijuana is sufficient to show continuing criminal activity. There was no evidence, however, as to when Lucero was a drug dealer nor when he was arrested for possession of marijuana.

Further, as was held in Commonwealth v. Eazer, 455 p320, 312 A2d 398 (1973), any inference of continuity may be overcome by the fact that later surveillance turned up nothing suspicious. In Lucero's case, Fred Hill testified that his surveillance that lasted almost six months did not reveal any criminal activity at Lucero's residence thereby strongly indicating that this was an isolated transaction.

The above information, since the affidavit is completely silent as to the history of drug activity on Lucero's residence, does not establish a "continuing series of events" on the premises to overcome a claim of staleness. State v. Powell 98 NM 569, 632 P2d 1207 (Ct. App. 1981). In fact, direct testimony from Hill at the trial demonstrates the exact opposite. Hill testified that he had personally kept Lucero's residence under surveillance for over six (6) months and that he watched

the house at least two times per week. During the entire time that he observed Lucero's residence, he was unable to gather sufficient information to get a search warrant for Lucero's residence. One can safely assume that Hill did not witness any drug possession or drug dealing at Lucero's residence that provided Hill with probable cause to arrest Lucero. One can also safely assume that Hill was unable to gather sufficient information to even get a search warrant for Lucero's residence to search for contraband. The preceding information bolsters Lucero's contention that the information contained in the affidavit concerning Lucero's drug dealing or drug possession is highly questionable as to its veracity and certainly establishes that there was no on going criminal activity.

Other relevant factors this court should consider in claims of staleness

include: 1) the amount of contraband said to be on the premises; 2)whether the person possessing the drugs is a resident of the premises and 3)prior history of suspects State v. Kittredge 36 Or. App. 603, 585 P2d 423 (Or. App. 1978). In Kittredge, the affidavit stated in part that a confidential, reliable informant was on the defendant's premises within the past 96 hours and while there, he observed marijuana. The informant did not state what amount he had seen. The issue to be resolved by the Oregon Appellate Court was whether the information provided in the affidavit was stale because of the passage of 96 hours. The Court in Kittredge carefully analyzed the facts in that case and held that the information provided by the informant was stale.

In this case, the informant states only that he observed "a small amount" of marijuana within the past 72 hours. There is no information as to what is meant by

small amount. Nevertheless, it can be reasonably inferred that the amount constituted no more than a marijuana cigarette. Furthermore, there is nothing in the affidavit as to why the affiant believes that the small amount would not be consumed within the seventy-two (72) hours. See State v. Scheer, 49 Or. App. 937, 620 P2d 973, 974 (1980).

This Court should also consider whether the affidavit states in whose possession the marijuana was allegedly seen. "Possession of contraband by one who lives in place, as opposed to possession by one who is merely a visitor on the premises gives rise to a stronger inference that the drug is still there at a later time." State v. Anderson, 585 P2d 423, 424 (Or. App. 1978). The court in Anderson found that failure to set forth the amount of the drugs seen and the identity of the person possessing the controlled substances was insufficient

to establish probable cause rendering the search unlawful. Likewise here, the affidavit fails to state in whose possession the marijuana was seen, and why that person and the marijuana would still be on Lucero's residence seventy-two (72) hours later.

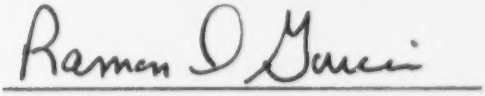
Finally, this court should consider the prior history of criminal activity involved in Lucero's premises. There is no question that the affidavit fails to identify the person who was in possession of the marijuana or whether there were other persons in the residence at the time that the informant saw the small amount of marijuana.

Because the affidavit fails to provide any of the above information, this court should find that the information contained in the affidavit was stale and did not give rise to probable cause for the issuance of the warrant.

CONCLUSION

For the reasons stated above, petitioner Chris Lucero requests that this Court grant his petition for writ of certiorari.

Respectfully Submitted,



Ramon I. Garcia
Attorney for Petitioner
106 North Washington
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IN THE SUPREME COURT OF

THE STATE OF NEW MEXICO

WEDNESDAY, SEPTEMBER 22, 1993

No. 21,508

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs .

CHRIS LUCERO,

Defendant-Petitioner.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is denied.

FURTHER ORDERED that the Record in Cause No. 14385 is returned to the Clerk of the Court of Appeals.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By _____
Chief Deputy

IN THE COURT OF APPEALS OF

THE STATE OF NEW MEXICO

STATE OF NEW MEXICO

Plaintiff-Appellee,

vs .

CHRIS LUCERO,

Defendant-Appellant.

APPEAL FROM

THE DISTRICT COURT OF CHAVES COUNTY

WILLIAM J. SCHNEDAR, District Judge

TOM UDALL, Attorney General
PATRICIA A. GANDERT,
Assistant Attorney General
Santa Fe, New Mexico
Attorneys for Plaintiff-Appellee

RAMON I. GARCIA
Roswell, New Mexico
Attorney for Defendant-Appellant

MEMORANDUM OPINION

PICKARD, Judge.

Defendant appeals his conviction of possession of fourteen ounces of marijuana with intent to distribute pursuant to NMSA 1978, Section 30-31-22 (Cum. Supp. 1991). Defendant raises three issues on appeal: (1) whether the trial court erred in denying Defendant's motion to suppress the evidence on the basis that the affidavit was facially invalid for failure to establish probable cause; (2) whether the information contained in the affidavit is stale because the affidavit states that a small amount of marijuana was seen at Defendant's residence seventy-two hours before the warrant was issued; and (3) whether failure to raise the issue of the "no knock rule" constitutes fundamental error.

Other issues raised in Defendant's docketing statement but not briefed are deemed abandoned. See State v. Fish, 102 N.M. 775,777, 701 P.2d 374, 376 (Ct. App.), cert. denied, 102 N.M. 734,

Appendix "B"

700 P.2d 197 (1985). We affirm.

PROBABLE CAUSE

Defendant contends that the affidavit is facially invalid because it failed to satisfy the veracity and basis of knowledge prongs of the probable cause test set forth in State v. Cordova, 109 N.M. 211, 213-14, 784 P.2d 30, 32-33 (1989). We disagree.

Search warrants based in whole or in part on unnamed informants must contain sufficient detail to allow the issuing magistrate to make an independent determination that probable

cause exists. Id. at 213, 784 P.2d at 32. The search warrant affidavit must therefore set forth a substantial basis for both believing the informant and concluding that the informant gathered the information of illegal activity in a reliable fashion. Id.; see SCRA 1986, S-211(E) (Repl. 1992).

Regarding the first prong of the test, on its face the affidavit sets forth the following bases for a determination that the informant can be believed: (1) on two prior occasions, information provided by the informant proved to be reliable and truthful; and (2) the informant was sufficiently reliable to have been entrusted by the police to make controlled buys of illegal drugs within six months of the affidavit. Therefore, the affidavit in this case is distinguishable from the affidavit in State v. Therrien,

110 N.M. 261, 794 P.2d 735 (Ct. App. 1990), overruled on other grounds by State v. Barker, 114 N.M. 589, 584, 844 P.2d 839, 844 (Ct. App. 1992), relied on by Defendant. In Therrien, the mere statement without any substantiating details by a police officer that the officer personally knew that the informant was reliable was insufficient to satisfy the veracity prong. Id. at 263, 794 P.2d at 737. As in Cordova, the informant in the instant case satisfied the veracity prong because the informant furnished information to the affiant that had proven to be true and correct on past occasions. See Cordova, 109 N.M. at 212, 784 P.2d at 31. In order to establish a record of veracity for the purpose of probable cause, it is not necessary, as Defendant suggests, for the informant's past tips to have led

to conviction. State v. Gutierrez, 91 N.M. 542, 547, 577 P.2d 440, 445 (Ct. App. 1978). On its face, there is sufficient information in the affidavit to support a determination that the confidential informant can be believed.

Regarding the second prong of the test, the affidavit contains the following information to support a conclusion that the informant's basis of knowledge is sufficient: (1) extensive, long-term dealings with marijuana that demonstrate the informant's familiarity with marijuana and his ability to identify it when seen; and (2) the informant's personal observation of a small amount of marijuana at Defendant's residence. Personal observation is sufficient to satisfy the basis of knowledge prong. State v. Ramirez, 95 N.M. 202, 204, 619 P.2d 1246, 1248 (Ct. App. 1980); see state

v. Cervantes, 92 N.M. 643, 647, 593 P.2d 478, 482 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979). On its face, there is sufficient information in the affidavit to support a determination that the informant had a sufficient basis of knowledge.

STALENESS

Defendant also asserts that the information in the affidavit regarding the presence of a small amount of marijuana at Defendant's residence seventy-two hours prior to the issuance of the warrant is stale and fails to establish probable cause that marijuana would still be found at Defendant's residence seventy-two hours later. Defendant contends that the information contained in the affidavit is insufficiently related to the time of the issuance of the warrant because the nature of the criminal activity

is merely an isolated transaction. See State v. Garcia, 90 N.M. 577, 578, 566 P.2d 426, 427 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977). Defendant further contends that other relevant factors such as (1) the smallness of the amount of marijuana observed by the informant, (2) a lack of information in the affidavit to indicate whether the person in possession of drugs is a resident of the premises, and (3) a lack of information regarding the prior history of the suspects combine to render the information in the affidavit stale. See State v. Scheer, 620 P.2d 973, 974-75 (or. Ct. App. 1980); State v. Kittredge, 585 P.2d 423, 424-25 (or. Ct. App. 1978).

Probable cause to authorize the issuance of a search warrant requires a factual showing that "an accused,

at the time of the application for warrant, is in possession of illegal property or the fruits of a crime or that evidence relating to the commission of a crime exists on the premises sought to be searched." State v. Donaldson, 100 N.M. 111, 115, 666 P.2d 1258, 1262 (Ct. App.), cert. denied, 100 N.M. 53, 665 P.2d 809 (1983). The degree of proof necessary to justify a search warrant supported by probable cause is "more than a suspicion or possibility but less than a certainty of proof." Id. at 116, 666 P.2d at 1263.

The relevance of the time factor depends on whether the alleged criminal activity indicates an isolated transaction or a continuing series of events. Garcia, 90 N.M. at 578, 566 P.2d at 427. Regarding the time factor, the Garcia Court also stated the following:

> "If there is a reasonable basis in the affidavit for the conclusion that the criminal activity alleged by the informer is of a continuing, ongoing nature, the passage of time between the informer's last observations of that activity and the issuance of the warrant is less significant than when no such showing is made in the affidavit."

Id. at 579, 566 P.2d at 428 (quoting State v. Austria, 524 P.2d 290, 294 (Haw. 1974)).

Under the circumstances of this case, the affidavit contains the following information to support a conclusion that Defendant, who was listed in the affidavit as residing at the address where the marijuana had been observed, was engaged in possession of illegal drugs on a continuing basis rather than just a single occurrence: (1) based on information from the New Mexico Department of Probation and Parole, Defendant had just completed

a probation period for possession of marijuana two months before issuance of the warrant; (2) based on information provided by officer Hill of the Roswell Police Department, Hill had arrested Defendant on prior occasions for possession of illegal drugs. See Garcia, 90 N.M. at 579, 566 P.2d at 428 (month-old information from informants regarding their personal observation of heroin on premises on separate occasions and statements regarding the defendant's personal heroin habit demonstrated criminal activity of a continuing and ongoing nature that was not stale for purpose of establishing probable cause). Nor are we persuaded by Defendant's argument that seventy-two hours is necessarily an extensive amount of time between a reliable informant's observation and the issuance of a warrant. The circumstances of the

instant case can be distinguished from those in State v. Powell, 96 N.M. 569, 632 P.2d 1207 (Ct. App. 1981), in which the only reliable information indicated-criminal drug activity that ended six months prior to the issuance of the warrant. See id. at 570-71, 632 P.2d at 1208-09.

Unlike the Oregon cases upon which Defendant relies, the affidavit in the instant case contains information that would indicate that the marijuana might still be on Defendant's premises at the time the warrant was issued. See Scheer, 620 P.2d at 974-75 (affidavit failed to establish probable cause when there were no distinguishing details to show why "a quantity of green vegetable substance" identified as marijuana would still be on the premises forty-eight hours later); Kittredge, 585 P.2d at 424-25 (evidence

was suppressed the affidavit failed to provide any details as to the amount of drugs observed, who occupied the premises that were searched, who possessed the marijuana, or any prior history regarding the suspects). The court in Kittredge acknowledged that the scales might have been tipped to uphold the affidavit had there been details specifying who resided at the premises being searched and details regarding a history of drug activity on the part of the suspects. Id. at 425; see State v. Scheidemann, 448 P.2d 358, 360 (or. 1968); State v. Black, 585 P.2d 44, 46 (or. Ct. App. 1978). In the case at hand, the affidavit contains information to reasonably support the following conclusions: (1) Defendant is engaged in the criminal activity of possession of drugs on an ongoing basis; (2)

Defendant resides at the premises to be searched; and (3) Defendant has a prior history of involvement with illegal drugs. Therefore, we determine that the information in the affidavit was not stale. Accordingly, we affirm the trial court's determination that the affidavit sufficiently complied with probable cause requirements.

FUNDAMENTAL ERROR

Defendant contends that it was fundamental error for his first trial attorney to fail to raise the "no knock rule" issue in the motion to suppress. Defendant further argues that it was fundamental error for the trial court to refuse Defendant's second trial attorney, who is also the counsel on appeal, an opportunity to raise the no knock issue during voir dire. We are not persuaded by either of Defendant's arguments.

Any failure by the first attorney to raise the no knock issue in the motion to suppress could have been cured by current counsel. Specifically, counsel could have requested the trial court to suppress the evidence on this basis. Counsel cites to no such efforts to invoke a ruling of the trial court. In addition, counsel admits that his only attempt to raise this issue at the trial level was made during voir dire, even though he was alerted to the possible relevance of this issue prior to trial.

There is no factual basis to support Defendant's allegation that the trial court would not allow the no knock issue to be raised. The trial court merely prevented counsel from raising the issue during the inappropriate time of voir dire for what was, in all likelihood, an inappropriate purpose.

See State v. Sheetz, 113 N.M. 324, 327, 825 P.2d 614, 617 (Ct. App. 1991) (proper standard of police conduct is a question of law and policy to be decided by courts). In order to preserve an issue for review on appeal, it must appear that the appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court. Woolwine v. Furr's Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987). Failure to make a specific argument results in a failure to preserve the issue for appellate review. State v. Goss, 111 N.M. 530, 532-33, 807 P.2d 228, 230-31 (Ct. App.), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991). Accordingly, we determine that Defendant failed to preserve this issue for appeal.

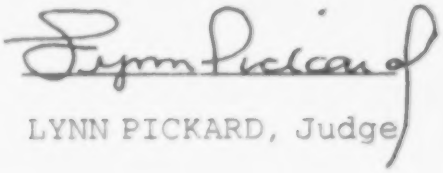
In its discretion, an appellate court may review an issue raised for

the first time on appeal if it involves fundamental error. SCRA 1986, 12-216 (B) (2) (Repl. 1992). However, in the instant case there are no facts in evidence upon which this Court can evaluate the merits of a fundamental error claim. The only information in the record regarding the no knock issue consists of comments made by counsel during voir dire. Arguments of counsel, unsupported by evidence, do not constitute evidence. State v. Wynne, 108 N.M. 134, 136, 767 P.2d 373, 375 (Ct. App. 1988), cert. denied, 108 N.M. 115, 767 P.2d 354 (1989). Nor can this Court speculate as to matters outside the record. State v. Henderson, 81 N.M. 270, 271-72, 466 P.2d 116, 117-18 (Ct. App. 1970). Due to the total absence of any factual basis in the record upon which to evaluate the no knock issue, we are

unable to decide the merits of this issue.

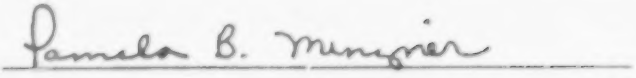
For the reasons stated above, we affirm.

IT IS SO ORDERED.

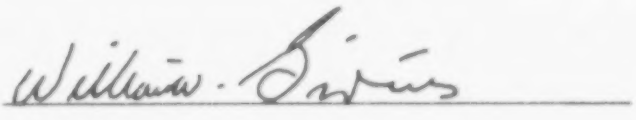


LYNN PICKARD, Judge

WE CONCUR:



PAMELA B. MINZNER, Chief Judge



WILLIAM W. BIVINS, Judge

IN THE DISTRICT COURT OF CHAVES COUNTY

STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff,

vs .

CR-92-103

CHRIS LUCERO,

Defendant.

ORDER DENYING MOTION TO SUPPRESS

The Defendant's Motion to Suppress came on for hearing on the 15th of June 1992. Based upon review of the Affidavit for Search Warrant and the memoranda furnished to the Court, the Court finds:

1. The time period set out in the affidavit - within the past 72 hours- does not render the information stale;

2. There is sufficient information in the Affidavit regarding the reliability of the informant that a neutral magistrate could properly find that the information furnishes probable cause for the issuanee of a search warrant.

Accordingly, the Court concludes that there was probable cause for the

issuance of the Search Warrant in this case, and the Motion to Suppress is denied.

/s/ W. J. Schnedar
William J. Schnedar
District Judge

Submitted by:

VERNON O.M. HENNING
SENIOR TRIAL PROSECUTOR

Noted:

MONICA MUNOZ
ASSISTANT PUBLIC DEFENDER